

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 341 OF 2017

M/s.Jayantilal Investments	...Petitioner
vs.	
Madhuvihar Co-operative Housing Society Ltd.	...Respondent

WITH
WRIT PETITION 342 OF 2017

M/s.Jayantilal Investments	...Petitioner
vs.	
Madhuvihar Co-operative Housing Society Ltd.	...Respondent

Mr.Yatin R. Shah with Divya Tekwani for Petitioner
Mr.Kumaresh Purohit i/b. Purohit & Purohit for Respondent.

CORAM : ROHIT B. DEO, J.

DATED : 27 JULY 2022

PC. :

1. Petitioner firm is the plaintiff and the Respondent society is the defendant in Suit 6276/2004, and the challenge in the petition is to the order dated 8.7.2016 rendered by the learned Ad-hoc District Judge and Assistant Sessions Judge, City Civil & Sessions Court, Greater Bombay (Trial Judge) dismissing Chamber Summons 980/2013 and Chamber Summons No.1401/2013 which were taken out by the plaintiff for amendment of the plaint.

The substantive and primary relief sought in Suit 6276/2004 is two fold. The first relief is that the defendant be restrained by an order of

permanent injunction from encroaching upon plot assigned CTS 1068/1 situated in Village Kandivali, Taluka Borivali, Mumbai Suburban District, Mumbai and the other relief is that the defendant be ordered to pay to the plaintiff damages of Rs.3 lakhs (Rupees Three lakhs). Rest of the prayers seek consequential reliefs.

2. The gist of the plaintiff's case is that the owners of the suit property agreed to sell the suit property, which admeasures 8599.57 sq.mtrs to the plaintiff. The owners further executed an irrevocable Power of Attorney in favour of Mr.Mahendra Vora and others and in view of the agreement referred to supra the plaintiff became entitled to develop, construct and sell the apartments in the buildings constructed. The plaintiff claims that due to a proposed D.P. road in the revised draft development plan which passes through the property, by natural sub-division, plot admeasuring 6701 sq.mtrs. assigned Survey 1A, Hissa No.1-part and 2-part C.T.S. 1068/1 was permitted to be developed under Section 21 of the Urban Land (Ceiling and Regulation) Act, 1976. The plaintiff secured sanction to the building plan of proposed building "Madhuvihar" comprising Wings A, B, C, D and E and the construction was completed in 1989. The plaintiff claims that the building plans were modified and amended from time to time between 1986 and 1994 and the flats were sold

to various purchasers. The plaintiff then claims that in the year 1992 the building plan for additional structures touching the D Wing was sanctioned and commencement certificate was issued. The plaintiff then avers that the defendants and its members filed suit in the City Civil Court at Mumbai, being Long Cause Suit 4385/1997 *inter alia* seeking conveyance of the suit property in favour of the defendant. The plaintiff in Long Cause Suit 4385/1997 took out Notice of Motion 4205/1997 which was allowed and the plaintiff was restrained from carrying out construction on plot assigned 1068/1 admeasuring 6701 sq.mtrs. The plaintiff submitted amended plan to the Corporation and obtained sanction on 29.3.2001 for construction of additional and separate building which would not be connected with the said wings. The plaintiff, who was the defendant in Long Cause Suit 4385/1997, then took out notice of motion seeking permission to continue with the construction, which notice of motion was dismissed. The plaintiff – defendant in the said civil suit approached the High Court which dismissed the appeal and the special leave petition preferred in the Supreme Court of India was also dismissed.

It appears that as on the date of institution of Suit 6276/2004, from which proceedings this petition emanates, the suit filed by the defendant society and its members in the City Civil Court was pending. It is broadly on such factual matrix, that the plaintiff filed the subject suit seeking

reliefs, which are noted supra.

3. The recitals in Chamber Summons 980/2013 which the plaintiff took out seeking amendment of the plaint may now be considered.

(i) The plaintiff contended that during the pendency of the suit, the plaintiff was dispossessed from the suit property on 18.1.2013.

(ii) The plaintiff further contended that the decree dated 31.3.2004 passed by the City Civil Court in Suit 4385/1997 which is modified by the High Court vide judgment dated 7.10.2010 in First Appeal 786/2004, is illegal, null and void and unenforceable.

(iii) Record reveals that during the pendency of Suit 6276/2004, Suit 4385/1997 which was instituted by the society seeking conveyance of the suit property, was decreed, and this Court modified the decree by order dated 7.10.2010 in First Appeal 786/2004.

(iv) The plaintiff proposed to add certain additional prayers as prayers (a1) to (a5), which read thus :

“(a1) that this Hon'ble Court be pleased to declare that the Plaintiffs have been obstructed by the Defendants from going to the plot land bearing CTS No. 1068/1 at village Kandivili , Taluka Borivili, Bombay Suburban District more particularly described in Exhibit-A to the plaint;

(a2) that this Hon'ble Court be pleased to declare the decree dated 31st March, 2004 passed by this Hon'ble Court in Suit No.4385 of 1997 and modified by the Hon'ble High Court by an order dated 7th October, 2010 passed in First Appeal No.786/2004 is illegal, null and void and unenforceable;

(a3) that this Hon'ble Court be pleased to declare that the Defendants have wrongfully dispossessed the Plaintiffs on 18th January , 2013 from the suit property bearing CTS No.1068/1 at village Kandivili, Taluka Borivili, Bombay Suburban District more particularly described in Exhibit-A to the plaint.

(a4) that this Hon'ble Court be pleased to decree the defendants to pay mesne profits to the Plaintiffs at the rate of Rs 50,000/ per day from the day of dispossession i.e, January, 2013 and for that purpose this Hon'ble Court be pleased to institute inquiry before this Hon'ble court in the manner thought fit and proper.

(a5) that this Hon'ble court be pleased to decree that the defendants handover possession of the suit property as described in Exhibit "A" ” to the Plaintiff back to the Plaintiffs.”

4. The learned trial Judge rejected Chamber Summons 980/2013 and Chamber Summons 1401/2013 vide orders dated 8.7.2016, which are impugned herein.

(i) The learned trial Judge noted that the suit instituted by the society is decreed against the plaintiff and others and First Appeal 989/2004 is dismissed by the High Court. The Supreme Court remitted the appeal to the High Court and by judgment dated 7.10.2010 the appeal was dismissed. The plaintiff filed special leave petition which the Supreme Court dismissed on 3.12.2010. The plaintiff filed review application before the High Court which is dismissed on 5.7.2011.

(ii) The learned trial Judge held that after the plaintiff failed at every stage in the litigation, the chamber summons is taken out on 19.7.2013 proposing to incorporate challenge to the judgment and decree which is upheld till the Supreme Court.

(iii) The learned trial Judge then noted that by judgment and decree in Suit 4385/1997 the plaintiff is directed to execute the conveyance of the suit property in favour of the society. The learned trial court reasoned that in view of the judgment and decree directing conveyance of the entire suit property in favour of the society, the plaintiff cannot incorporate the plea

that he was dispossessed or a prayer seeking possession.

5. The learned Counsel for the Petitioner–plaintiff Mr. Yatin Shah would argue that since subsequent events were sought to be brought on record, the chamber summons could not have been rejected. It is further submitted that the plaintiff was in possession of at least portion of the suit property and was illegally dispossessed and all that the plaintiff proposes to incorporate was the factum of illegal possession during the pendency of the suit. The learned Counsel for the defendant would submit that the order impugned is unexceptionable. The learned Counsel for the defendant would invite my attention to the judicial orders in Civil Suit 4385/1997 which was filed by the defendant, by the trial court and then by the High Court and the Supreme Court.

6. It would be relevant to note the operative part of the judgment of the trial court in Civil Suit 4385/1997 in which the plaintiff in the subject suit was defendant 1.

“Suit is partly decreed in terms of prayer (b) and (d) .

The Defendant No.1 is ordered and directed to transfer and convey and cause to be transferred and conveyed the suit property to the plaintiffs and to do all acts deeds

matters and things necessary for effectively transferring conveying and vesting the same into the plaintiffs in accordance with the provisions of Maharashtra Ownership Flats Acts within three years from the day of Judgment/Order.

Commissioner for taking accounts to verify and to take accounts as provided in Order 20 Rule 16.

The suit is dismissed in respect of other prayers i.e. (a), (b1), (c), (e), (f), (fi), (g) and (h). The interim relief granted stands vacated.

Decree accordingly.”

It appears that the society preferred First Appeal 786/2004 to the extent that the trial court did not grant certain prayers and the Petitioner – plaintiff – defendant 1 in that suit preferred First Appeal 989/2004. Both the appeals are decided by common judgment dated 7.10.2010 and the operative part of the judgment reads thus :

“(i) First Appeal No. 786/2004 is allowed and First Appeal No. 989/2004 is dismissed.

(ii) The defendant no.1 is directed to forthwith transfer and convey and cause to transfer and convey the suit property i.e. "Madhu Vihar" Scheme, in CTS No.1068/1 admeasuring 6071 square metres situated at Kandivali (West), Mumbai, to the plaintiffs and to do all acts deeds matters and things necessary for effectively transferring, conveying and vesting the same into the plaintiffs.

(iii) The defendant no.1 is restrained from erecting any additional structure over the suit property i.e. "Madhu Vihar" Scheme, in CTS No.1068/1,

admeasuring 6071 square metres situated at Kandivali (West), Mumbai, without the consent of the persons with whom he has entered into agreements to take flats in the building constructed on the suit plot.

(iv) The direction of the learned trial court, in so far as rendering of the accounts by the promoter and appointment commissioner is concerned, the same stands confirmed.

(v) Parties shall bear their own costs.”

The Supreme Court dismissed the special leave petition and the High Court dismissed the review petition vide order dated 5.7.2011.

7. The learned trial Judge has rightly observed that the proposed amendments cannot be allowed inasmuch as the entitlement of the society to the conveyance of the entire suit property admeasuring 6071 sq.mtrs. along with the Madhuvihar scheme, is upheld till the Supreme Court and the defendant 1 is restrained from erecting any additional structure over the suit property. The decision on the entitlement of the society to conveyance has assumed finality. In this view of the matter, the plaintiff has no right whatsoever to claim possession of the property which is required to be conveyed in favour of the society. It is obvious, that even if utmost latitude is given to the plaintiff and it is assumed that the plaintiff was dispossessed, the plaintiff has no legal right to restoration of the possession.

8. The learned Counsel for the plaintiff, however, argues that the High Court has not clamped blanket injunctive order preventing the plaintiff from carrying on additional construction. The learned Counsel emphasises on clause (iii) of the operative part of the High Court order in First Appeal 786/2004 and First Appeal 989/2004 which is already noted supra. It is difficult to agree with the submission of the learned Counsel that the said clause is of any relevance in the context of the issue involved. It is obvious that if at all the apartment owners and the society consent to the plaintiff undertaking additional construction, then to that limited extent the plaintiff may have the licence to enter into the suit property for the limited purpose of carrying out the additional construction. However, such licence, even if it is assumed that the society and its members shall oblige the plaintiff, does not create any possessory right in favour of the plaintiff.

9. I see no error in the view taken by the learned trial Judge.

10. The petitions are without substance and are dismissed.

(ROHIT B. DEO, J.)